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Supreme Court of the United States

No. 299—October Term, 1961

ROOSEVELT RACEWAY, INC.,

Appellant.

against

GEORGE P. MONAGHAN, as Commissioner of Harness Racing, etc.,

Appellee.

MOTION TO DISMISS
and
BRIEF IN SUPPORT THEREOF

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Comes now the appellee above named and moves to dismiss the appeal taken to this Court by Notice of Appeal dated June 16, 1961, on the ground that the decision of the Court of Appeals of the State of New York rests on State grounds adequate to support it; and appellee submits the following brief in support of his motion.

Statement

The statement of the essential facts and of the progress of the case through the Courts of New York are stated with substantial accuracy in appellant's Jurisdictional Statement, which was delivered to the appellee on August 10, 1961.

The Federal Question

New York passed in 1956 (L. 1956, ch. 837) an Act which will be referred to as the Pari-Mutuel Revenue Act. One

of its principal purposes was to assist raceways to enlarge and modernize their plant and equipment to attract and accommodate larger crowds—to the end that more people would place bets (not elsewhere placeable) at the tracks, thereby increasing the size of the pari-mutuel pool and, in consequence, the State's revenue from taxes levied upon it.

Under the 1956 statute, the State assumed (1) an obligation to reimburse the raceways (out of moneys otherwise payable to the State as a tax on the pari-mutuel pool) for the cost of new capital construction; and also assumed (2) an obligation to reimburse the raceways for federal income taxes payable by the raceways upon the sums the raceways had received from the State through its obligation described as (1) *supra*.

Under a 1959 statute (L. 1959, ch. 881) the State reduced its benefactions to the raceways and altered its policy by bringing about two objectives:

(a) no permits for new construction were to be issued after the effective date of the statute, July 1, 1959; and

(b) the duty to reimburse for federal income taxes through the obligation described as (2) *supra* was excised from the Pari-Mutuel Revenue Act as it previously existed.*

The Federal Question is this: Does the portion of the 1959 statute quoted in the margin violate the Contracts Clause of the Constitution?

The Court of Appeals of the State of New York answered the question in the negative, relying principally on

---

* This was accomplished in this language (L. 1959, ch. 881, pp. 2251-2252): "No harness race track shall be reimbursed for any income taxes paid to the United States with respect to any payments heretofore or hereafter made to such harness race track from the construction account."

the inherent weakness of the so-called "contract" pointed to by the appellant—the "contract" was of a type which the State, by virtue of its own Constitution, lacked the power to enter into, or whose terms it possessed (by express constitutional grant) the power to alter or repeal after having entered into the contract.

We, therefore, assert that the decision below rested on State grounds adequate to sustain it.

Pertinent Provision of N. Y. Constitution

Article XVI, § 1 of the State Constitution, as amended in 1938, reads:

> "The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.
>
> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

The Court below placed such reliance on the above provision of the State Constitution as to show that its decision rested on a State ground adequate to support it.

(1)

The Court below held that since the moneys in the pari-mutuel pool were taxable by the State, to the extent that the State had undertaken to return certain portions

of the tax to the tracks themselves, first to reimburse them for construction costs, and then to reimburse them for federal income taxes assessed on the sum representing reimbursement for construction costs, *the State was conferring an exemption from taxation.* Hence the State had the undoubted right to rely on Art. XVI, § 1, quoted above, to alter or repeal the exemption.

The Court of Appeals, whose decision is reported in 9 N. Y. 2d 293, 174 N. E. 2d 71, after saying that it was not entirely clear what Roosevelt Raceway, Inc., now appellant in the Supreme Court, claimed to be the content of the contract which it asserts the State made with it (p. 306), and after referring to Roosevelt Raceway's brief, went on to say "the only contract which may be said to have been made is a contract for tax relief—a promise by the State to keep the reduction enacted in the 1956 tax formula intact and unchanged * * *" (pp. 306-307). The Court followed this analysis of the situation by immediately saying (p. 307):

> "Such a contract, if not indeed void in its inception—and this is a question as to which we express no opinion—is at all times revocable by the State. This was proclaimed and established, beyond the power of the Legislature to alter, by section 1 of Article XVI of our present Constitution; * * *".

The Court then said (p. 307):

> "In other words, in view of the first sentence of section 1 of article XVI, the State may not be said to have breached any contract or agreement with Roosevelt to maintain its State tax at the level provided for in 1956 for the reason that no one was empowered to enter into such an agreement on behalf of the State."

And the rejection of Roosevelt Raceway's arguments was made impressive, beyond the possibility of refutation, by these words (pp. 307-308):

> "Whatever assurance they derived from the 1956 act was necessarily coupled with the knowledge not only that the 1956 Legislature was powerless to bind its successors, but that rates and levels of taxation are the staples of each legislative session.* (See Revised Record of Constitutional Convention of 1938, Vol. 2, p. 1127.) Roosevelt and the other tracks must be deemed to have acted in the light of what the law presumes them to have known in this respect. And, since this is so, they can hardly urge that they undertook their capital improvements in consideration of an irrevocable promise or agreement that their taxes would continue to be computed in accordance with the formula set up by the 1956 Legislature and that such taxes would not thereafter be increased."

On the basis of the foregoing analysis of the opinion of the Court below, we submit that it is clear that the decision rested on State grounds adequate to support it.

(2)

On May 15, 1961, Roosevelt Raceway, Inc., made a motion in the Court of Appeals of the State of New York to amend its remittitur by adding thereto

> "language to show that the reversal of the decision below was on the ground that Chapter 881 of the Laws of 1959 repealed the right to Petitioner-Respondent to receive reimbursement from its construction account for the Federal income taxes paid by it, whether before or after the effective date of said statute, on the sums received from its construction account for capital improvements and that in so reversing this Court considered, determined, and ruled adversely to Petitioner-Respondent's contention that said Chapter 881 of the Laws of 1959, as so construed and applied to repeal said right, impaired the obligation of a contract between Petitioner-Respondent and the State of New York, in violation of Article 1, § 10 of the Constitution

* Taxes, this Court said in *Bull v. United States*, 295 U. S. 247, 259 (1935), "are the life-blood of government, * * *".

> of the United States, and deprived Petitioner-Respondent of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, to the complete exclusion of any State ground of decision whatsoever; * * *."

On May 18, 1961, the Court of Appeals denied the motion and said (9 N. Y. 2d 966):

> "Motion to amend the remittitur denied upon the ground that the matters passed upon are adequately set forth in the Court's opinions."

(3)

We are fully aware of the line of cases holding that when, in cases brought to this Court under the Contracts Clause, there is a dispute as to whether there ever was or was not a contract, this Court has a clear right and duty to inquire into "the existence of the contract and the nature and extent of its obligation * * *". *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561 (1942).

But that is not the issue here. Since the State Constitution declares that any contract granting tax exemption "may be altered or repealed" (with exceptions not here relevant), the exercise of this right to alter or repeal—a right of which all parties to the "contract" are conclusively presumed to have been aware—does not present a federal question.

Whether the contract provided for tax exemption is a question of State law, within the province of the highest Court of the State to decide with finality. Such seems to have been the underlying principle of *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47 (1920). Here a statute of 1853 exempted from taxation the property of the appellant beyond a certain stipulated value. The exemption was repealed

in 1909, and appellant's entire property was taxed. This Court held the later act constitutional, saying, per Mr. Justice HOLMES (p. 50):

> "This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation. It may be that too much stress was laid upon the absence of a consideration for the exemption; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385-387; and that a fairly strong argument could be made for interpreting the grant of 1853 as purporting to be coextensive with the contract recited in that grant, whether correctly recited or not. It may be, if it were material, that the contract of 1858 should be construed as a continuance of that of 1852 as reformed notwithstanding the habitually inaccurately used word 'annulled.' *United States* v. *McMullen*, 222 U. S. 460, 471. But taking into consideration the general attitude of the Courts toward claims of exemption, adverted to by the Court of Appeals, the fact that the agreement of 1858 shows that the parties concerned did not suppose that they had an irrevocable grant, and especially the fact that the constitution of New York in force in 1853, provided in Article VIII, § 1, that all general laws and special acts passed pursuant to that section might be altered or repealed, we are not prepared to say that the decision below was wrong."

The foregoing language seems to have been unwittingly overlooked by the appellant, although a brief reference to the case is made at pp. 24-25 of the Jurisdictional Statement.

In *Clyde* v. *Gilchrist*, 262 U. S. 94 (1923), this Court (again speaking *per* Mr. Justice HOLMES), referred both to the rule that in cases under the Contracts Clause this Court determines for itself the existence or not of a contract, and to the established exception to the rule in tax exemption cases. This Court said (p. 97):

> "While it is true that we are not bound by the construction of the New York statutes by the New York Courts in deciding the constitutional question, yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result. *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47, 50."

New York Electric Lines Co. v. *Empire City Subway Co.*, 235 U. S. 179 (1914), Jurisdictional Statement, p. 26, is distinguishable. The Court, after restating the familiar rule that it will make its own determination as to the existence of a contract, held that an ordinance repealing for non-user a franchise to use the public streets in a certain manner did not violate the Contracts Clause. This Court said (p. 194):

> "But, while the grant becomes effective when made and accepted in accordance with the statute and the grantee is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal."

It may be said of the State's undertaking (in 1956) to pay to the raceways the amount of the federal income taxes on the State's subsidy granted to the raceways, that it "was a mere bounty, valuable as long as the State chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the State saw fit". *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).

The State did, of course, profit by the increased attendance at modernized tracks. But the Legislature might well have realized that to give aid to the tracks out of public moneys showed dubious respect for constitutional limita-

tions on the use of public moneys.* N. Y. Const., Art. V, § 1 and Art. VII, § 7. Hence to argue that there exists a duty to retain, without amendment, the provision concerning bounties merely because the State gained by it, is as censurable as for a trustee to resist removal for making unauthorized investments by saying that actually they produced a net gain to the *cestui*. As was said in *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 438 (1910): "The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose"—or, we deem it permissible to add, as to the existence of any constitutional authorization for the original exemption.

CONCLUSION

The motion to dismiss the appeal should be granted.

August 17, 1961.

Respectfully submitted,

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* Especially since the amount of any raceway's federal income tax was wholly beyond the State's power to limit or control.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 299

ROOSEVELT RACEWAY, INC.,

Appellant,

vs.

GEORGE P. MONAGHAN, as Commissioner of Harness Racing and constituting the State Harness Racing Commission,

Appellee.

On Appeal From The Court Of Appeals Of The State Of New York

BRIEF OF ROOSEVELT RACEWAY, INC., APPELLANT, IN REPLY TO MOTION TO DISMISS

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INDEX

	PAGE
I. Preliminary	1
II. As To The Nature Of The Contract Between Roosevelt And The State Created Pursuant To The 1956 Law	3
III. As To Whether This Court Is Bound By The Decision Of The Court Of Appeals As To The Nature Of The Contract Between Roosevelt And The State	8
IV. The Court Of Appeals' Denial Of Roosevelt's Motion to Amend Its Remittitur Does Not Support The Attorney-General's Position	10
V. As To The Substantiality Of The Issue Here Presented	11
Conclusion	11
Appendix	
Exhibit A	1a
Opinion Letter of Attorney-General Dated March 9, 1956	1a
Exhibit B	4a
Opinion Letter of Attorney-General Dated July 5, 1957	4a

TABLE OF CASES

	PAGE
American Smelting Co. v. *Colorado*, 204 U. S. 103 ...	2
Atlantic Coast Line R. R. Co. v. *Phillips*, 332 U. S. 168	8
Clyde v. *Gilchrist*, 262 U. S. 94	8
Goldblatt v. *Town of Hempstead*, 6 L. Ed. 2d 854	9, 10
Hale v. *State Board*, 302 U. S. 95	8
Irving Trust Co. v. *Day*, 314 U. S. 556	8
Madden v. *Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697, *certiorari denied* 332 U. S. 761	6
Maryland Jockey Club v. *United States*, 189 F. Supp. 70, *affirmed* 61-2 U. S. T. C. ¶9549	6
Matter of Blaikie, 11 A. D. 2d 196, 202 N. Y. S. 2d 659	5, 6
New York Electric Lines Co. v. *Empire City Subway Co.*, 235 U. S. 179	2
People v. *Stephens*, 71 N. Y. 527	2
Russell v. *Sebastian*, 233 U. S. 195	2
Troy Union R. R. Co. v. *Mealy*, 254 U. S. 47	8
United States v. *Maryland Jockey Club*, 210 F. 2d 367, *certiorari denied* 347 U. S. 1014	6
Wisconsin & Michigan Ry. Co. v. *Powers*, 191 U. S. 379	2
Wright v. *Georgia R. R. & Banking Co.*, 216 U. S. 420	8

TABLE OF CONSTITUTIONS AND STATUTES

	PAGE
New York Public Housing Law	7
New York Real Property Tax Law	7
New York Tax Law	7
New York State Constitution (Art. XVI, § 1)	2, 4, 5
Pari-Mutuel Revenue Law—	
Session Laws	
Laws 1956, c. 837	1, 2, 3, 4, 5, 6, 7, 8, 10
Subdivision 5(a)	3
Subdivision 6(b)	3
Subdivision 9	5
Subdivision 10	3
Laws 1959, c. 881	1, 6
Unconsolidated Laws	
§ 7603	5
United States Constitution (Art. I, § 10)	8

TABLE OF OTHER AUTHORITIES

Opinion Letter of Attorney-General Dated March 9, 1956	4
Opinion Letter of Attorney-General Dated July 5, 1957	4, 5
Revised Rules of Supreme Court (Rule 16(3))	1

IN THE

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OCTOBER TERM, 1961

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Appellee.

On Appeal From The Court Of Appeals Of The State Of New York

BRIEF OF ROOSEVELT RACEWAY, INC., APPELLANT, IN REPLY TO MOTION TO DISMISS

This brief is submitted pursuant to Rule 16(3) of the Revised Rules of this Court.

I

Preliminary

The motion to dismiss made by the Commission,* the Appellee, is based on the contention that the decision below

* Hereinafter in this brief, as in the Jurisdictional Statement, "the Commission" refers to the Appellee, the State Harness Racing Commission, "Roosevelt" to the Appellant, Roosevelt Raceway, Inc., "the 1956 Law" to Chapter 837 of the Laws of 1956 of the State of New York, and "the 1959 Law" to Sections 7 and 10 of Chapter 881 of the Laws of 1959. The terms "the under 1955 bets", "the over 1955 bets" and "base tax" which are used in this brief are defined at p. 12 of the Jurisdictional Statement.

rested on state grounds adequate to support it and, therefore, that no Federal question is raised in the Jurisdictional Statement. The Commission's said contention is premised on the argument (see pp. 4 and 5 of its Brief) that the Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") decided that the contract between the State and Roosevelt* created pursuant to the 1956 Law was one for tax relief or exemption, *i.e.*, to maintain the State's taxes on harness tracks at the level provided for in 1956 and not to increase them thereafter, and that such a contract could be altered or repealed by the State under the power reserved to the State by Section 1 of Article XVI of the State Constitution. The Commission further urges that the Court of Appeals' said determination as to the nature of the contract between the State and Roosevelt is one which this Court is bound to follow.

It will be shown that the contract between Roosevelt and the State created pursuant to the 1956 Law did not grant tax exemption to Roosevelt or limit the State's taxing power and that this Court is not bound by the Court of Appeals' determination on said subject.

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* As appears from our Jurisdictional Statement (pp. 25-26) the Court of Appeals ruled that a contract was created as a result of the action taken by Roosevelt, with Commission approval, pursuant to the 1956 Law. The Court of Appeals was required so to hold because the State's promise in the 1956 Law was made to a limited number of corporations, as noted at pp. 11-12 and 24-25 of the Jurisdictional Statement (see *Russell* v. *Sebastian*, 233 U. S. 195; *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179; *American Smelting Co.* v. *Colorado*, 204 U. S. 103; and *People* v. *Stephens*, 71 N. Y. 527, 549) and was not a mere declaration of legislative policy to the public at large (see *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385-7).

II

As To The Nature Of The Contract Between Roosevelt And The State Created Pursuant To The 1956 Law*

The State agreed that in each year in which the State receives its base tax from all harness tracks, Roosevelt is to retain a portion of the over 1955 bets produced by the capital improvements (which portion is deposited in a construction account and is sometimes hereinafter referred to as "construction account moneys") until the total amount of the construction account moneys so retained equals the cost of the improvements plus Federal income taxes paid on said construction account moneys. See Subdivisions 5(a), 6(b) and 10 of the 1956 Law.** Under the 1956 Law, the portion of the over 1955 bets which Roosevelt is to retain is determined by (i) multiplying the over 1955 bets by the same percentages which were utilized in fixing the taxes based on the under 1955 bets and (ii) dividing the sum so arrived at in half (Subdivision 5(a)).

The 1956 Law contained no tax exemption or commitment by the State that its taxes based either on the under 1955 bets or on the over 1955 bets would remain fixed at the rates in effect in 1956. The Attorney-General does not challenge the assertion at pp. 26-27 of the Jurisdictional Statement that the State could have changed the tax rates at any time after the enactment of the 1956 Law and that nothing in the 1956 Law prevented the State from changing the rates in effect in 1956 to the following, for example:

---

* The nature of the contract created and the majority and dissenting opinions with respect thereto are reviewed in detail in the Jurisdictional Statement, to which we respectfully refer.

** The 1956 Law is set forth in full in Exhibit C of the Appendix to the Jurisdictional Statement at p. 38a, *et seq.*

Out Of Each Dollar Bet Daily	*State*	*Track*
Up to $175,000	5	10
Over $175,000 but not over $300,000	9	6
Over $300,000 but not over $400,000	11	4
Over $400,000	12	3

Neither the majority opinion in the Court of Appeals nor the Attorney-General here cites any section of the 1956 Law in support of the position that the 1956 Law granted tax exemption and limited the taxing powers of the State. They fail so to do because the 1956 Law contains no such provision.

The dissenting opinion of Judge Burke in the Court of Appeals thus correctly states (see Jurisdictional Statement p. 31a):

> "Indeed, there is no language in the 1956 law which promises exemption to the tracks or yields a taxing power. Under the 1956 law the State was left free to raise its rate of tax in the future."

The notion that the 1956 Law created a contract for tax exemption or for maintenance of taxes at 1956 levels never occurred to the present Attorney-General of the State or to his predecessor, present Senator Jacob K. Javits, *ante litem motam*, when they were requested to furnish opinions with respect to the 1956 Law. Attorney-General Javits advised the Majority Leader and the Speaker of the Assembly of the State of New York (and subsequently the Governor) that the proposed 1956 Law was constitutional. A copy of his opinion to the former is appended hereto as Exhibit A. If the 1956 Law had created a contract for tax relief or exemption, he obviously would have pointed out that it was in conflict with Section 1 of Article XVI of the State Constitution.* So also, the present Attorney-General, when called on to advise the Commission as to whether Roosevelt, under the 1956 Law, was entitled to reimbursement for Federal income taxes paid by Roosevelt on construction

---

* The 1956 Legislature sought the advice of Attorney-General Javits so as to make certain that the bill did not violate the State Constitution. It is therefore submitted that this shows that the Legislature had no intention to violate the State Constitution by granting tax exemption or by limiting the taxing power of the State.

account moneys, did not state that said law granted tax exemption and, therefore, that Roosevelt was not entitled to reimbursement in view of Article XVI, Section 1 of the State Constitution. A copy of his opinion to the Commission is appended hereto as Exhibit B.

The Attorney-General evidently recognizes that the 1956 Law contains no commitment by the State relative to tax exemption or tax liability because he seems to advance a different theory at pp. 3-4 of his Brief. He there states that the Court of Appeals below held that:

> "... to the extent that the State had undertaken to return certain portions of the tax to the tracks themselves, first to reimburse them for construction costs, and then to reimburse them for federal income taxes assessed on the sum representing reimbursement for construction costs, *the State was conferring an exemption from taxation.*" (emphasis in the original)

On this theory, every contract by the State to make a payment for a service performed constitutes the grant of an exemption from taxation, because the State has to utilize tax revenues in making such payment. Obviously, this is not so.

In any event, the State under the 1956 Law did not contract to return any portion of any tax to harness tracks making capital improvements. The Pari-Mutuel Revenue Law has always provided (Unconsolidated Laws, § 7603) that a tax is levied only when a payment to the State Tax Commission is required to be made. The 1956 Law contains an identical clause (Subdivision 9). In other words, the language of the 1956 Law and of the Pari-Mutuel Revenue Law shows that construction account moneys retained by harness tracks from bettors are not tax moneys because such moneys are not required to be paid over to the State.

The cases also so hold, *i.e.*, that such moneys do not constitute tax moneys or other revenues of the State. See, *Matter of Blaikie*, 11 A. D. 2d 196, 202 N. Y. S. 2d 659 (1st

Dep't); cf. *Madden* v. *Queens County Jockey Club*, 296 N. Y. 249, 254, 72 N. E. 2d 697, 699, certiorari denied 332 U. S. 761; *United States* v. *Maryland Jockey Club*, 4 Cir. 210 F. 2d 367, certiorari denied 347 U. S. 1014; *Maryland Jockey Club* v. *United States*, 189 F. Supp. 70 (D. Md.), affirmed 4 Cir., 61-2 U. S. T. C. ¶ 9549. Indeed, the majority of the Court of Appeals here ruled (see Jurisdictional Statement p. 8a) that, for the purposes of this litigation, it accepted Roosevelt's position (which had been sustained by the Appellate Division in another case entitled *Matter of Blaikie*, 11 A. D. 2d 196, 202 N. Y. S. 2d 659) that the construction account moneys retained by Roosevelt pursuant to the 1956 Law are not State revenues.

The best evidence that the contract between Roosevelt and the State created pursuant to the 1956 Law was not one wherein the State limited its power to tax is found in the language used by the Legislature in the 1959 Law. The Legislature in 1959 did not state that it was withdrawing a tax exemption granted by the 1956 Law or that it was eliminating a provision in said law which called for the maintenance of taxes at the 1956 or at any other level. What the Legislature said in the 1959 Law was that it was terminating the right of capital improvement tracks to retain construction account moneys in an amount sufficient to reimburse them for Federal income taxes. The 1959 Law thus provided:

> "§ 10. It is the intent of the legislature in hereby amending subdivision ten of section forty-five-a of the pari-mutuel revenue law, as added by chapter eight hundred thirty-seven of the laws of nineteen hundred fifty-six, to clarify what was its intent in relation to the reimbursement of any income taxes paid to the United States with respect to any payments made to any harness race track from a construction account, and it is the further intent of the legislature hereby to provide that no harness race track shall be reimbursed from the construction account for any income taxes paid by such harness race track to the United States, whether paid before or after the effective date of this section."

It is evident from this language that the Legislature, in 1959, did not think that it was dealing with and eliminating tax exemptions or restrictions on its power to tax. This language shows that the Legislature in 1959 was terminating the right of Roosevelt and other capital improvement tracks to receive moneys.

The dissenting opinion of Judge Burke in the Court of Appeals therefore justifiably observed (Jurisdictional Statement pp. 32a-33a):

> ". . . This contract, unlike a tax exemption, was intended to and did produce more revenue for the State. By its terms it could only increase but could not decrease the State's revenue. Section 1 of Article XVI of the New York State Constitution is not, therefore, applicable.
>
> "The 1959 law did not, as appellant would have us believe, impose a tax. It makes no attempt to exercise the taxing power. It seeks to change the promise made by the 1956 Legislature to the capital improvement tracks that, if they qualified for construction moneys by investing their own money and completing improvements founded by the Commission to be such as 'will ultimately add to the revenues of the State', the tracks would be reimbursed *for the full cost to the tracks* of the improvement from moneys withheld from the over-1955 bets (see Pari-Mutuel Revenue Law, § 40). . . . The 1959 legislation did not raise the rate of existing taxes or impose new taxes. It does try to rewrite a contract." (emphasis in the original)

On this subject of whether the 1956 Law was intended to create tax exemptions, it is also to be noted that when the New York Legislature intends to grant tax exemptions it normally specifically labels them as such by using the words "exempt" or "exemptions". See, *e.g.*, New York Real Property Tax Law, §§ 420 to 489; New York Tax Law, §§ 3, 220 and 362; New York Public Housing Law, § 190.

The cases hold that tax exemptions and limitations on the power of a state to tax will not be found unless the

legislative intent is absolutely clear from the language of the statute. See *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 438; *Clyde* v. *Gilchrist*, 262 U. S. 94, 98; *Atlantic Coast Line R. R. Co.* v. *Phillips*, 332 U. S. 168, 172-73; *Hale* v. *State Board*, 302 U. S. 95, 103. Since the language of the 1956 Law does not show any such legislative intent, these cases call for an adjudication that the contract between Roosevelt and the State, created pursuant to the 1956 Law, was not one which exempted Roosevelt from taxes or limited the power of the State to tax.

III

As To Whether This Court Is Bound By The Decision Of The Court Of Appeals As To The Nature Of The Contract Between Roosevelt And The State

The Attorney-General states that he is aware that *Irving Trust Co.* v. *Day*, 314 U. S. 556, and other cases hold that, in actions involving a claim of impairment of the obligation of a contract in violation of Article I, § 10 of the Constitution of the United States, this Court will make its own decision as to the nature of the contract and will not be bound by the determination of a state court that no contract existed or that it was of a nature different than that claimed. However, the Attorney-General urges that this line of cases does not apply where the issue as to the nature of the contract is whether it is one for tax exemption. The Attorney-General claims that on said issue the decision of a state court is final and that this Court is bound thereby.

In support of his contention, the Attorney-General cites *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47; *Clyde* v. *Gilchrist*, 262 U. S. 94; and one or two like cases. None of the decisions bears out his contentions. Indeed, *Clyde* v. *Gilchrist* holds specifically to the contrary of the Attorney-General's position. It shows (see 262 U. S. at pp. 96-97)

that this Court makes its own determination as to whethe
a tax exemption has been granted.

What the cases cited by the Attorney-General do hold i
that where a state court has decided that a legislature di
not grant tax exemption, this Court is loath to interfer
because of the well-established rule that tax exemptions ar
not favored in the law and will only be found where th
legislative intent is unmistakable. In the cases cited by th
Attorney-General, the taxpayer's claim was that he ha
been granted tax exemption and thereafter unconstitution
ally deprived thereof. The state courts in those cases rule
that no tax exemption had been granted and this Court
after analysis of the issue, decided that, as a matter of pol
icy, it would not interfere so as to create an exemption an
thereby hamper a state's power to tax.

In the instant case, however, Roosevelt does not clai
that it was granted tax exemption and that the State'
power to tax was limited. It is the Attorney-General wh
contrary to the usual situation, asserts that a tax exemp
tion was created even though he cannot point to any
much less clear, legislative language to that effect. In thi
case, the usual reasons which impel this Court to go alon
with state court decisions holding against tax exemptio
(*i.e.*, that tax exemptions are not favored in the law an
will be found only where the intent to create them is clear
should cause this Court to determine that the contract be
tween the State and Roosevelt was not one for tax exemp
tion or tax relief.

A motion to dismiss was recently denied by this Cour
in *Goldblatt* v. *Town of Hempstead*, October Term, 196
Case No. 881, 6 L. Ed. 2d 854 (not officially reported). Th
Goldblatt motion involved a contention similar to that her
advanced by the Attorney-General. In the *Goldblatt* case, th
majority of the Court of Appeals construed a town ordi
nance as one which merely regulated an industry. The Ap
pellant in that case appealed to this Court, contending tha
its constitutional rights had been violated because the ordi

nance was not regulatory but confiscatory in nature. The Town moved to dismiss the appeal on the ground that no substantial Federal question was raised in view of the ruling of the majority opinion in the Court of Appeals that the ordinance was regulatory in nature. This Court denied the motion and noted probable jurisdiction.

In other words, in the *Goldblatt* case, this Court refused to grant a motion to dismiss even though the majority opinion in the Court of Appeals construed the ordinance as having a particular nature which would not involve a Federal question. So here, this Court should not deem itself bound by an interpretation of the 1956 Law by a majority of the Court of Appeals which is not sustained by the language of the law and which is the subject of a vigorous dissent.

IV

The Court Of Appeals' Denial Of Roosevelt's Motion To Amend Its Remittitur Does Not Support The Attorney-General's Position

Roosevelt made a motion in the Court of Appeals to have that Court amend its remittitur in the manner indicated in the Attorney-General's Brief. This motion was made "in order to effectuate review . . . in the Supreme Court of the United States" and to help in obtaining "the quickest possible determination by the Supreme Court of the United States of the Federal Constitutional questions involved" (Affidavit of Samuel I. Rosenman in support of motion). The Court of Appeals denied Roosevelt's motion, not upon the ground that the amendment of the remittitur sought by Roosevelt did not fairly describe the decision of the Court, but on the ground that "the matters passed upon are adequately set forth in the Court's opinions." It should be noted that the Court of Appeals did not refer only to the majority opinion, upon which the Attorney-General relies, but to all of the "opinions." The

opinions below, and particularly the dissenting opinions of Chief Judge Desmond and Judge Burke (see Exhibit A to the Jurisdictional Statement at pp. 21a and 23a), clearly demonstrate that the Court of Appeals' decision is within the appellate jurisdiction of this Court.

V

As To The Substantiality Of The Issue Here Presented

The Attorney-General's Brief urges only that the decision of the Court of Appeals is binding here. It does not contend that, if it is wrong, nevertheless the question presented by Roosevelt's appeal lacks substantiality. Our Jurisdictional Statement, it is submitted, demonstrates that a substantial Federal question is here involved.

CONCLUSION

This Court should deny Appellee's motion to dismiss and should grant plenary consideration of the constitutional issue involved.

Respectfully submitted,

SAMUEL I. ROSENMAN,
Attorney for Appellant.

GEORGE MORTON LEVY,
MAX FREUND,
ERNEST A. GLEIT,
ROSENMAN COLIN KAYE PETSCHEK & FREUND,
Of Counsel.

APPENDIX

Exhibit A

OPINION LETTER OF ATTORNEY GENERAL DATED MARCH 9, 1956

STATE OF NEW YORK

DEPARTMENT OF LAW

ALBANY

March 9, 1956

By Hand

HON. JOSEPH F. CARLINO
Majority Leader
The Assembly
Capitol
Albany, New York

Re: Assembly Int. 156, Pr. 4308
by Mr. Ryan

Dear Mr. Carlino:

Under date of March 8, 1956, on behalf of yourself and Speaker Heck you requested an opinion from this office respecting the above-entitled bill in its present form.

I am enclosing a copy of a memorandum addressed to Senator Erwin under date of February 27, 1956, which deals with the companion Senate bill before its most recent amendment.

The most recent amendment of the Ryan bill eliminates the provisions which establish a construction fund in the custody of the State Harness Racing Commission, from which the tracks would be reimbursed for the expenses of certain improvements. In its present amended form the bill provides that tracks which apply for and receive permission from the State Harness Racing Commission to

make one or more capital improvements must maintain a construction account in their own name. This change, in my opinion, eliminates the constitutional doubts respecting the use of State funds for private purposes, which I expressed in my previous memorandum.

The effect of the amended act is that tracks which do not contemplate capital improvements and which seek no permit under the provisions of subdivision 7 of Section 45-a are taxed on the basis of taxes paid in 1955 and a ceiling is thus placed on their tax.*

On the other hand, tracks which contemplate improvements and which receive a permit under subdivision 7 of Section 45-a are required not only to set aside additional moneys in a construction account but also to pay additional taxes over and above the taxes previously paid. Moreover, it would seem that the amounts deposited in the construction fund are subject to the possibility of being paid out as additional taxes either through the failure of the track to complete its approved construction program or by the failure of the tax payments of all the tracks to equal the total ta . collected in the year 1955. The compensating feature is that tracks which apply for and receive a capital improvement permit are eligible to receive a capital improvement license to conduct racing for a period of up to twenty-five years, depending on financing arrangements. This is in lieu of the annual license granted other tracks.

I call attention to the fact that while the last sentence of subdivision 4 of Section 45-a states that the balance of the retained amount of the pari-mutuel handle shall be disposed of as provided in subdivision 5, that subdivision makes no provision for the disposition of the retained amount by the tracks which have not received a construction permit from

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* This drafting error referred to by the Attorney-General was subsequently corrected in the bill as enacted. But this correction did not affect capital improvement tracks.

the State Harness Racing Commission. There are other provisions of this complex bill which are not clear.*

This office is being called upon to advise only on constitutional issues, if any, raised by the legislation. In the light of the construction that I place upon the bill, in its present form it is in our opinion a constitutional exercise of the legislative power.

Very truly yours,

JACOB K. JAVITS,
Attorney General

* Changes were subsequently made in the bill to take care of the questions raised by the Attorney-General but these have no bearing on the issues involved in this action.

Exhibit B

OPINION LETTER OF ATTORNEY GENERAL DATED JULY 5, 1957

July 5, 1957

Hon. George P. Monaghan
Commissioner of Harness Racing
745 Fifth Avenue
New York 22, New York

My dear Commissioner:

This is in reply to your letter concerning Section 45-a of the Pari-Mutuel Revenue Law (McKinney's Unconsolidated Laws § 7603-a) as added by Chapter 837 of the Laws of 1956.

Generally speaking, Section 45-a deals with capital improvements at harness race tracks, out of moneys which would otherwise accrue to the State, for the declared purpose of encouraging expansion and modernization of track facilities, thus benefiting the State in the form of increased revenue flowing from increased admissions to harness race meetings. So far as here pertinent, it provides for the establishment of a track "construction account" as the source of payment to a raceway which completes one or more capital improvements with the approval of the Harness Racing Commission, and for the transfer of funds from the construction account to the track's general funds as determined by the Commission. In this connection, subdivision 10 of Section 45-a reads as follows:

> "10. The payments provided in paragraph (b) of subdivision six of this section to be made from the construction accounts to harness race tracks shall be made only to such a harness race track which completes one or more capital improvements with the approval of the state harness racing commission and then only from the date of the completion of any

capital improvement with the approval of the state harness racing commission until such date as the amounts paid to such harness race track from the construction account, less income taxes paid thereon to the United States by such harness race track, equals the cost of the capital improvement as determined by the state harness racing commission. The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums. In determining the amount of taxes paid by any such harness race track to the United States in any calendar year it shall be deemed that said amounts were taxed at the highest rates actually paid to the United States by said harness race track for the particular year involved."

You state that "If the Harness Racing Commission authorizes the transfer of funds to the harness raceway in the exact amount of the cost of construction, the raceway will realize less than half of that amount after payment of federal taxes on the amount so transferred". You inquire (a) whether the Harness Racing Commission should authorize the transfer of funds in the construction account in an amount to pay the federal income taxes in full, so that the raceway may net the complete cost of the improvement after federal income taxes are paid thereon, and (b) if there are insufficient funds in the construction account to pay these federal taxes in the year in which they are incurred, is the construction account for the following year chargeable with the difference.

The issue involved is whether the phrase "less income taxes paid thereon to the United States by such harness race track" in subdivision 10 means that the cost of an improvement is to be figured and established independent of and apart from the federal income taxes on the amount received to cover such cost and as requiring that the amount of such federal taxes be paid to a raceway in addition to capital improvement cost. In other words, according to your illustration, in order to reimburse a harness raceway the total cost of a completed capital improvement in the

sum of $386,263.79, it would be necessary to transfer to the raceway out of the construction account the sum of $804,716.22, i.e., not merely the federal income tax at 52 per cent on $386,263.79 but also the federal tax on the sums returned to pay the tax.

As I read subdivision 10, however, not only does it fail to convey that meaning but it requires a contrary result, namely, that in determining the amount of capital improvement cost payable to a track, no allowance whatever is to be made for federal taxes levied on such amount. In this connection it should be noted that subdivision 10 also provides that "The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums". I am of the opinion that these exclusions are to be read together with the "less income taxes" provision in the same subdivision as indicating a definite legislative purpose to omit all four items in arriving at capital improvement cost. In short, I construe the statute as meaning that while a raceway is entitled to be reimbursed or paid the cost of a capital improvement, the Legislature expressed an intention to limit such recovery to the actual cost thereof and to exclude federal taxes on the amount received as the cost of the improvement, interest on indebtedness, real estate taxes and insurance premiums from payment out of a construction account. Thus, for example, if a race track completes a capital improvement at a cost of $100,000, it is to be reimbursed from the construction account in the sum of $100,000 and no more.

Apart from the foregoing, there appears to be no rational basis for a contrary conclusion. Assuming no statute such as here was involved, if a harness race track were to undertake a capital improvement with moneys of its own accumulated from income, any federal tax payable on such moneys would, of course, be payable by the track itself out of its own funds. In the instant situation, the State has in effect merely agreed to pay a track the amount

of a capital improvement cost, but, as in the case of a
improvement undertaken by a track with its own funds
there is no reason why the State should pay any federa
tax thereon.

In view of this disposition of your first inquiry, it i
unnecessary to consider your second question.

Very truly yours,

Louis J. Lefkowitz
Attorney General.